

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARY ANN ARMAS,
Plaintiff,

v.

NEW ALBERTSON'S INC.,
an Ohio Corporation,
Defendant.

NO. CV-13-3036-LRS

**ORDER DENYING
MOTION FOR SUMMARY
JUDGMENT**

BEFORE THE COURT is the Defendant's Motion For Summary Judgment (ECF No. 34). The motion is heard without oral argument.¹

I. BACKGROUND

Pursuant to this court's August 26, 2013 "Order Re Motions For

¹ Plaintiff's response to the motion was not timely filed. Responses to dispositive motions must be filed within 21 days, LR 7.1(b)(2)(B), and Plaintiff's response was filed 27 days after the motion was filed. The court cannot, however, justify granting summary judgment to Defendant on this basis when there is no apparent prejudice to Defendant from the late filing of the response. That said, Plaintiff should be mindful of the filing deadlines set forth in the Local Rule.

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1 Summary Judgment And For Leave To Amend Complaint” (ECF No. 25),
2 Plaintiff filed an Amended Complaint naming New Albertson’s, Inc., as the
3 Defendant in lieu of Supervalu, Inc. (“Supervalu”) which was granted summary
4 judgment on the Plaintiff’s claims. Plaintiff’s Amended Complaint (ECF No.
5 26) was filed on September 3, 2013, which is the same date Defendant New
6 Albertson’s, Inc., indicates it was served with the Amended Complaint. New
7 Albertson’s Inc., filed its Answer to the Amended Complaint on September 16,
8 2013 (ECF No. 28). Among the affirmative defenses pled in its Answer is that
9 Plaintiff’s claims are barred by the applicable statute of limitations. In its
10 August 26, 2013 order, this court noted that “[a]t the appropriate juncture, New
11 Albertson’s may tender a statute of limitations defense and the court will rule
12 whether under Fed. R. Civ. P. 15(c) the filing of the Amended Complaint should
13 ‘relate back’ to the filing of the original Complaint on April 1, 2013, so as to
14 render the Amended Complaint timely under the applicable Washington statute
15 of limitations.” As noted, New Albertson’s has tendered this defense and now
16 moves for summary judgment based on it.

17 **II. DISCUSSION**

18 Unless state law provides a more liberal standard, the requirements of
19 Fed. R. Civ. P. 15(c) apply where an amended complaint changes the name of
20 the defendant. If an amended complaint would “relate back” under the law that
21 provides the applicable statute of limitations, it “relates back” under Fed. R.
22 Civ. P. 15(c). See Fed. R. Civ. P. 15(c)(1)(A); *Saxton v. ACF Industries, Inc.*,
23 254 F.3d 959, 962-63 (11th Cir. 2001). The effect is to defer to more liberal
24 state or federal laws on this point. “Whatever may be the controlling body of
25 limitations law, if that law affords a more forgiving principle of relation back
26 than the one provided in this rule, it should be available to save the claim.”

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1 Advisory Committee Note to 1991 Amendment to Fed. R. Civ. P. 15(c)(1)(A).

2 Here, Washington law provides the applicable statute of limitations for
3 this personal injury action brought pursuant to this court's diversity jurisdiction
4 (3 years per RCW 4.16.080). It appears, however, that Washington law does
5 not provide a more liberal standard regarding "relation back." In addition to the
6 requirements of Washington's Superior Court Civil Rule (CR) 15(c), an
7 amended complaint changing or adding a defendant will not relate back if the
8 original omission of the defendant resulted from "inexcusable neglect."
9 *Haberman v. Wash. Pub. Power Supply Syst.*, 109 Wn.2d 107, 174, 744 P.2d
10 1032, 750 P.2d 254 (1987). Inexcusable neglect exists where a party is
11 ascertainable upon reasonable investigation and no reason for the initial failure
12 to name the party appears in the record. *Id.* The party relying on CR 15(c) must
13 demonstrate that any neglect was excusable. *Perrin v. Stensland*, 158 Wn.App.
14 185, 197-99, 240 P.3d 1189 (2010).

15 Under federal law, any neglect by the party relying on Fed. R. Civ. P.
16 15(c) is irrelevant. The U.S. Supreme Court has explained that "relation back"
17 under Rule 15(c)(1) depends on what the party to be added knew or should have
18 known, not on the amending party's knowledge or its timeliness in seeking to
19 amend the pleadings." *Krupski v. Costa Crociere, S.p.A.*, ____ U.S. ____,
20 130 S.Ct. 2485, 2489-90 (2010). In *Krupski*, the Supreme Court declared it
21 immaterial that plaintiff's counsel delayed seeking leave to amend after
22 defendant's counsel disclosed the proper defendant was "Costa Crociere," not
23 "Costa Cruises." The Court held that "[p]laintiff's dilatory conduct . . . [cannot]
24 justify denial of relation back under Rule 15(c)(1)(C)." *Id.* at 2496. See also
25 *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 560 (7th
26 Cir. 2011).

27 Under Fed. R. Civ. P. 15(c)(1), the following three requirements must be

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1 satisfied: 1) the claim against the newly added defendant must have arisen out
2 of the conduct set forth in the original complaint; 2) the new defendant must
3 have received sufficient notice of the original action “within the period provided
4 by Rule 4(m) for serving the summons and complaint” (120 days) so that it will
5 not be prejudiced in defending the claim on its merits; and 3) the new defendant
6 must have known or should have known that, “but for a mistake concerning the
7 proper party’s identity,” it would have been named in the original complaint.

8 The first requirement is clearly satisfied. The claim against New
9 Albertson’s arises out of the conduct set forth in the original complaint.

10 With regard to the second requirement, it is necessary that New
11 Albertson’s, Inc. had notice of the pending action within the 120 day period
12 provided by Fed. R. Civ. P. 4(m) for serving the summons and complaint.
13 Because Plaintiff’s original Complaint was filed on April 1, 2013, that means
14 New Albertson’s needed to have such notice no later than July 29, 2013. If
15 there is a sufficient agency or community of interest between the person served
16 and the intended defendant, notice may be imputed to the intended defendant.
17 *Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S.Ct. 2379 (1986). A community or
18 identity of interest “generally means that the parties are so closely related in
19 their business operations or other activities that the institution of an action
20 against one serves to provide notice of the litigation to the other.” 6A Wright,
21 Miller & Kane, *Federal Practice & Procedure* §1499 at 197-98 (2010). Such
22 an identity of interest has been found between a parent corporation and a
23 wholly-owned subsidiary. See *Goodman v. Praxair, Inc.*, 494 F.3d 458, 473-75
24 (4th Cir. 2007); *Bayatfshar v. Aeronautical Radio, Inc.*, 934 F.Supp.2d 138, 144
25 (D.D.C. 2013); *E.I. duPont de Nemours & Company v. Phillips Petroleum*
26 *Company*, 621 F.Supp. 310, 314 (D. Del. 1985); and *Holden v. R.J. Reynolds*
Industries, Inc., 82 F.R.D. 157, 161-162 (M.D. N.C. 1979).

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1 In its August 26, 2013 order, this court noted that counsel for SuperValu
2 submitted a declaration (ECF No. 9) attesting to the following: 1) in June of
3 2006, Albertson's LLC conveyed the store and the real property upon which it is
4 situated to New Albertson's, Inc; 2) although SuperValu owned stock in New
5 Albertson's on June 14, 2010 (the date of the incident), SuperValu is a separate
6 and distinct corporate entity from New Albertson's; 3) SuperValu did not own
7 the store in question; 4) the employees who worked at that store were not
8 employees of SuperValu; and 5) SuperValu sold all of its stock in New
9 Albertson's in March 2013, just shortly before Plaintiff commenced the
10 captioned action on April 1, 2013. Nothing in the papers submitted in
11 conjunction with New Albertson's motion for summary judgment controvert
12 these facts.

13 SuperValu, however, did not merely own stock in New Albertson's: it
14 owned all of the stock in New Albertson's which was its wholly-owned
15 subsidiary. This is a matter of public record. See [www.reuters.com/](http://www.reuters.com/finance/stocks/SVU/key-developments/article/2672666)
16 [finance/stocks/SVU/key-developments/article/2672666](http://www.reuters.com/finance/stocks/SVU/key-developments/article/2672666); and
17 marketwatch.com/story/10-q-supervalu-inc-2013-10-17. It is true that
18 Plaintiff's action was not commenced until April 1, 2013, with the filing of its
19 original Complaint against SuperValu as the named defendant. This was just a
20 matter of days after SuperValu sold its interest in New Albertson's on March
21 21. The record establishes, however, that during the time New Albertson's was
22 still wholly-owned by SuperValu, Plaintiff, through her counsel, had already
23 made a formal claim with SuperValu regarding the incident of June 14, 2010. A
24 September 25, 2012 letter to Plaintiff's counsel at the time (David B. Huss,
25 Esq.) from Sedgwick Claims Management Services, Inc., specifically a Bill
26 Talmadge who was the "Claims Examiner III- Liability SuperValu Incident
27 Services Unit," acknowledged the claim. (Ex. A to ECF No. 14). And, in a

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1 letter dated February 2, 2013, Plaintiff's current counsel of record advised Mr.
2 Talmadge that he had been associated with Mr. Huss on the claim and that "this
3 was done in anticipation of the need to institute a lawsuit for Ms. Armas, since
4 there's never been a settlement offer extended, and the statute is going to run in
5 a few months." Counsel also advised that "[i]f your company/your principal has
6 an interest in mediation of this claim, we still have time to do that." (Ex. B to
7 ECF No. 14).

8 In sum then, SuperValu's knowledge that an action would soon be filed
9 was imputed to its wholly-owned subsidiary, New Albertson's. Therefore, New
10 Albertson's had the requisite notice that an imminent action was contemplated,
11 providing it with adequate opportunity to prepare a defense. As noted, that
12 action was then filed within a matter of days after SuperValu sold its interest in
13 New Albertson's and within a few weeks after SuperValu was served with the
14 original Complaint on April 12, 2013. (ECF No. 2). Under these
15 circumstances, the court finds the second requirement of Rule 15(c)(1)(C)-
16 "notice of the action" to the new defendant, New Albertson's- is satisfied,
17 notwithstanding that the action against SuperValu was not yet technically
18 pending at the time SuperValu sold its interest in New Albertson's.

19 The third requirement for "relation back" is closely related to the second
20 and ensures the defendant to be added knew or should have known all along that
21 its joinder was a possibility. *E. I. duPont*, 621 F.Supp. At 314. If New
22 Albertson's did not actually know that it would have been named in the original
23 Complaint filed against SuperValu but for a mistake concerning the proper
24 party's identity, it certainly should have known the same considering: 1) New
25 Albertson's was the wholly-owned subsidiary of SuperValu at the time of the
26 incident; 2) per the declaration of SuperValu's counsel, New Albertson's owned
27 and operated the store in question and employed the individuals who worked

1 there; and 3) New Albertson's remained SuperValu's wholly-owned subsidiary
2 through the time when Plaintiff presented a formal claim to SuperValu and up
3 until just days before the original Complaint against SuperValu was filed.

4 5 **III. CONCLUSION**

6 Fed. R. Civ. P. 15(c)(3) is intended to protect a plaintiff who mistakenly
7 targets the wrong defendant, and then discovers, after the relevant statute of
8 limitations has run, the identity of the proper party. The purpose is to "balance
9 the interest of the defendant protected by the statute of limitations with the
10 preference expressed in the Federal Rules of Civil Procedure in general, and
11 Rule 15 in particular, for resolving disputes on their merits." *Krupski*, 130 S.Ct.
at 2494.

12 For the reasons set forth herein, Plaintiff's September 3, 2013 Amended
13 Complaint "relates back" to the filing of her original Complaint on April 1,
14 2013. Accordingly, the Amended Complaint is not barred by the applicable
15 statute of limitations and Defendant New Albertson's, Inc.'s, Motion For
16 Summary Judgment (ECF No. 34) is **DENIED**.

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter
18 this order and to provide copies to counsel of record.

19 **DATED** this 11th day of December, 2013.

20
21 *s/Lonny R. Suko*

22

LONNY R. SUKO
23 Senior United States District Judge
24
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